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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 944

HERMAN BLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 68-69) is reported at 158 F.2d 519.

JURISDICTION

The judgment of the circuit court of appeals was entered November 27, 1946 (R. 70), and a petition for rehearing (R. 71-73) was denied December 26, 1946 (R. 74). The petition for a writ of certiorari was filed January 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The principal question presented is whether the trial judge's charge to the jury adequately explained the elements of the offenses charged as defined in the maximum price regulation.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and of Revised Maximum Price Regulation No. 528 are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

On April 9, 1946, an information in four counts was filed in the District Court for the Western District of Texas, charging petitioner with having willfully made sales of used tires at prices in excess of the ceiling prices (counts 1 and 2), willful failure to post ceiling prices (count 3), and willful refusal to deliver a receipt to a purchaser of a used tire (count 4) (R. 1-4). The respective counts of the information cited the particular provisions of Revised Maximum Price Regulation No. 528 alleged to have been violated. Petitioner's employee, Benjamin Goldberg, was charged and tried as a codefendant on counts 1, 2 and 3.

After a jury trial, petitioner was found guilty on all counts (R. 8, 64), and he was sentenced generally to pay a fine of \$1,000 and to imprisonment for eleven months (R. 12, 64).¹ On appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 70).

The evidence in support of the Government's case may be summarized as follows:

Petitioner owned and operated a warehouse in El Paso, Texas, for the sale of automobile and truck tires (R. 39-40). He employed Goldberg primarily as a watchman, but also to make sales of automobile tires in petitioner's absence (R. 40-41). There were two piles of used tires in the warehouse. Petitioner instructed Goldberg to sell from the pile of better tires at either \$8 or \$10 per tire, depending on their condition, and from the pile of poorer tires at \$3 each (R. 41-44). An O. P. A. investigator and a Liquor Control Board Inspector each testified that he purchased a tire selected from the pile of better tires at a price of \$10, as alleged in counts 1 and 2 (R. 25-26, 28-29; see also R. 41-42). Expert testimony showed that the tire involved in count 1 had a sectional

¹ Petitioner's codefendant Goldberg was found guilty on counts 1 and 2 (R. 8, 64), and sentenced generally to pay a fine of \$50 and to imprisonment for sixty days, but execution of the imprisonment sentence was suspended and Goldberg placed on probation (R. 13, 64). Goldberg did not appeal.

repair but was otherwise sound, and that the tire involved in count 2 was in need of a sectional repair (R. 36-37). The tires were introduced in evidence (R. 27, 29) and exhibited to the jury in the course of the expert testimony (R. 36-37). As shown both by the evidence (R. 32-33, 37) and the applicable O. P. A. Regulation (Table B-1, *infra*, p. 16), the respective price ceilings for these two tires were \$6.65 and \$3.15.

With respect to the violation charged in count 3, the evidence showed that a list of ceiling prices was not posted at petitioner's warehouse and could not be found, and that petitioner had admitted this to an O. P. A. investigator (R. 32).² The charge in count 4 was established by the testimony of the purchaser of the tire involved in count 1 that when he asked Goldberg for a receipt, the latter replied that "he did not give a receipt" (R. 29).³

ARGUMENT

The petition challenges the conviction on the grounds: (1) that the charge to the jury was fatally deficient, in that the court failed to ex-

² Goldberg, testifying for the defense, corroborated the Government's evidence as to the failure to post ceiling prices, but testified that a price list "from some tire company" was kept with the books (R. 50).

³ Goldberg testified that he always gave receipts and denied that he had failed to give one to this purchaser or that he told the purchaser he did not give a receipt (R. 43, 45).

plain and define what constituted a used tire and what constituted "substantial" compliance with the requirements of the regulation with respect to posting a price list and the provisions of the regulation requiring the issuance of a receipt (Pet. 3, 4-5, 7-9); and (2) that there was no evidence that the tires in question were used tires within the meaning of the regulation (Pet. 5, 8). The latter contention, which was first raised on petition for rehearing in the court below (see R. 73), is clearly without substance when considered in the light of the expert testimony (*supra*, pp. 3-4) that due to their condition and unserviceability, the tires, which were also exhibited to the jury, were salable under the regulation only as used tires at prices not to exceed \$3.15 and \$6.65, respectively.

Petitioner's attack upon the trial court's instructions is without merit. The court summarized the allegations of the information and in so doing cited the particular sections of Revised Maximum Price Regulation No. 528 alleged to have been violated (R. 54-56). The court then explained *seriatim* as to each count the elements of the respective offenses in terms of particular acts or conduct which are unlawful under the provisions of the regulation here involved (R. 56-57). The full text of these particular instructions

is set forth in the margin.⁴ At the conclusion of the charge, in response to the court's inquiry whether there were any exceptions, defense counsel "excepted" solely "for the reason that the information does not contain any allegation or sufficient allegation on which to base the charge,"

⁴"You are charged, gentlemen, as a matter of law, that under and by virtue of the Emergency Price Control Act, an Act of the Congress of the United States, of 1942, as amended, and the regulations issued thereunder, it was made unlawful for any person to knowingly and wilfully sell and deliver a used passenger automobile tire and in making sale of the same to charge and receive therefor the sum of \$10.00, the same being in excess of the maximum price as prescribed and set forth by the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the first count of the information herein.

"And further, it was unlawful for any person to sell and deliver to another a used passenger automobile tire of the dimensions as charged in the second count of the information, and to receive therefor the sum of \$10.00, which price was in excess of the maximum price permitted to be charged and collected as set forth in the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the second count of the information.

"And further, that it was unlawful for any person who was engaged in selling used passenger automobile tires, and a violation of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, to fail and neglect, wilfully fail and neglect to post and maintain at his place of business, as required by said regulations, notice and list of the maximum prices allowed to be charged and collected for used tires, reparable carcasses, and scrap rubber, in the course of said business and

but did not take any exception to the instructions quoted in the margin (R. 63).⁵

Petitioner does not (with one irrelevant exception) point out why or in what respects the instructions concerning failure to post ceiling prices (count 3) and failure to give a receipt (count 4) were deficient.⁶ And it is evident from a comparison of the instructions with the applicable

under said regulations, as charged as having been committed by the defendant Herman Bloch, as set forth in the third count of the information herein.

"You are further charged it is a violation of the Emergency Price Control Act of the United States of 1942, as amended, and regulations thereunder, in force on and before November 2, 1945; Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, for one dealing in used automobile tires to sell, wilfully and knowingly sell and deliver such used automobile tire and fail and refuse to issue and deliver in connection with such sale, to the purchaser of such tire, in response to a request, a receipt, invoice or sales slip showing in respect to said sale of such tire data and information required by said section of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder."

⁵ Rule 30 of the Federal Rules of Criminal Procedure provides:

"* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

⁶ The only deficiency alleged by petitioner with respect to either of these instructions is that the trial court erred in not explaining to the jury what constituted "substantial" compliance with the requirement that a price list be posted (Pet. 3). However, the provision of the regulation requiring post-

provisions of the regulation (sections 8 and 9, *infra*, pp. 14, 15) that the instructions properly and adequately explained to the jury the elements of the offenses proscribed by those provisions. Since the general sentence imposed on petitioner did not exceed that which could have been imposed on any one of the four counts, and since the validity of the convictions on counts 3 and 4 are not challenged on any other ground, it is immaterial on appeal whether the instructions concerning counts 1 and 2 were deficient. *Pinkerton v. United States*, No. 719, O. T. 1945, decided June 10, 1946, slip opinion p. 1, fn. 1.

Moreover, we submit that the instructions explaining the character of the ceiling-price violations charged in counts 1 and 2 were adequate in that they disclosed to the jury all of the elements of such an offense and pointed the way for the jury to arrive at their verdict depending upon

ing (Sec. 8, *infra*, p. 14), in terms requires that a price list be posted at each place of business in a manner plainly visible to the purchasing public. The evidence, both for the Government and the defense, showed that no price list had been posted anywhere at petitioner's place of business, and that there was not even a shadow of compliance with this requirement of the regulation. Thus, since no issue of "substantial" compliance was raised by the testimony, an instruction presenting this as an issue would not have been required, even had it been requested. See *Bird v. United States*, 187 U. S. 118, 132; *Grace v. United States*, 4 F. 2d 658, 661-662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Meyer v. United States*, 258 Fed. 212, 216 (C. C. A. 7).

their findings as to the facts. Thus, the court told the jury that as a matter of law, it was unlawful wilfully to charge \$10 for a used tire, since that price was in excess of the maximum price fixed in the regulation. Since there was no dispute as to the ceiling prices applicable to the tires involved in counts 1 and 2 or that they were sold for \$10 each, there can be no serious question but that the jury was sufficiently informed as to the applicable law embodied in the regulation.

Petitioner asserts that there is a conflict in this regard between the decision below and the decisions of the Third and Ninth Circuits in *United States v. Levy*, 153 F. 2d 995, and *Morris v. United States*, 156 F. 2d 525, respectively. The defect found in the trial judge's instructions in each of those cases was not, as petitioner implies, that the jury was instructed that if they found certain facts they should convict,⁷ but that the judge did not, in addition, instruct the jury as to the requirements of the statute and applicable regulations. See 153 F. 2d at 998-999; 156 F. 2d at 527, 528, 531. In the instant case, on the other hand, the requirements of the regulation were sufficiently explained to the jury. Indeed, the

⁷ Cf. *Horning v. District of Columbia*, 254 U. S. 135, and *Hewitt v. United States*, 110 F. 2d 1 (C. C. A. 8), certiorari denied, 310 U. S. 641, in which much more strongly worded charges of that kind were upheld.

court's explanation here was at least as detailed and informative as were the instructions approved by the Ninth Circuit in *Wilton v. United States*, 156 F. 2d 433, decided the day after the *Morris* decision was announced, and in which the opinion was written by Circuit Judge Albert Lee Stephens, who had written the opinions in the *Morris* and *Levy* cases.⁸ In the *Wilton* case, the jury was instructed that if it found certain facts, it was to convict, but this statement was prefaced by a brief allusion to the requirements of the regulation, phrased in terms of "the duty" of the defendant. This was held to be sufficient reference to the applicable law to sustain the charge, and the *Levy* case was distinguished on that ground. 156 F. 2d at 436.

Petitioner's further complaint that the jury was not instructed as to the meaning of the term "used tire" (see Sec. 17 of the regulation, *infra*, p. 15), is likewise unavailing, for there was no dispute or conflict of testimony at the trial concerning the meaning of the phrase or its applicability to the tires involved. Cf. *Deacon v. United States*, 124 F. 2d 352, 356-357 (C. C. A. 1), in which a similar contention concerning the definition of the word "lottery" was rejected. See also fn. 5, pp. 7-8 *supra*.

⁸ Judge Stephens was sitting by designation on the Third Circuit at the time the *Levy* case came before that court.

CONCLUSION

The decision below is clearly correct, and there is no real conflict of decisions or important question involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

APPENDIX

The Emergency Price Control Act (56 Stat. 23, 50 U. S. C. App., Supp. V, 901 *et seq.*), provides in pertinent part:

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable

to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Revised Maximum Price Regulation No. 528 (10 F. R. 2726, 10181) provides in pertinent part:

SECTION 1. *What this regulation covers—*

(a) *Transactions covered—*

(1) *New tires and tubes.* This regulation applies to all retail sales of new rubber tires and tubes for automobiles, trucks, busses, trailers, off-the-road equipment, farm-implements, tractors, industrial equipment, motorcycles, and aircraft. A tire or tube other than an aircraft tire or tube is "new" if it has been used less than 1,000 miles. An aircraft tire and tube is "new" if it has never been used. "Retail sale" means a sale to a buyer for his own use and not for resale. This regulation, however, does not apply to wholesale sales; such sales are covered by Revised Maximum Price Regulation 143. Neither does this regulation apply to manufacturers' or brand owners' sales of any new tires and tubes to any agency of the United States Government. New tires which the manufacturer or brand owner has found defective and not repairable, and which such manufacturer or brand owner has slashed or otherwise mutilated prior to his delivery to any person, shall be deemed scrap rubber, and the maximum price thereof shall be determined in accordance with the provisions of Revised Price Schedule 87.

(2) *Used tires and tubes and basic tire carcasses.* This regulation applies to all sales of used rubber tires and tubes and basic tire carcasses. This regulation does

not apply, however, to sales of used tires and tubes and basic tire carcasses when such tire or tube is sold to a splitter or reclaimer for splitting or reclaiming. Such sales are covered by Revised Price Schedule 87. Used tires and tubes and basic tire carcasses are defined in section 17.

* * * * *

SEC. 8. *Posting of prices.* (a) Every person engaged in the business of selling at retail any commodity or service covered by this regulation, shall keep posted at each place of business, in a manner plainly visible to the purchasing public, the following, clearly identified as such:

(1) A list of the maximum retail prices for the tires and tubes sold by him.

(2) A list of the maximum retail prices for his recapping services, and the additional charges that may be made for a tire carcass furnished by the seller.

(3) A list of the maximum retail prices for his tire and tube repair services.

(4) A list of the maximum prices which this regulation permits him to charge for extra services.

(5) A list of the maximum retail prices for reliners, patches, and boots (made from scrap materials) sold by him, and of the separate charges, if any, for the services of inserting such reliner, patch, or boot in the tire casing.

(b) Such lists shall set forth the dollars and cents maximum prices as fixed by this regulation. Use of lists having prices in excess of the dollars and cents maximum prices fixed by this regulation, accompanied by discounts or other deductions to arrive at the legal maximum prices, may not be used, and are an evasion of this section.

SEC. 9. *Sales slips and receipts*—(a) *Sales at retail.* If more than one article is included in one transaction, only one sales slip or receipt is required, provided that it contains the specified information for each article. The name and address of the seller and the date of sale must appear on every sales slip or receipt.

(1) *New tires and tubes.* Every seller of new tires or tubes shall give every buyer a sales slip listing (i) the type, size, ply, and brand name of the new tire or tube; (ii) the price; and (iii) if it is a factory second or factory reject, a statement to that effect.

(2) *Used tires and tubes and basic tire carcasses.* Every seller of used tires or tubes or basic tire carcasses shall give every buyer a sales slip listing: (i) the type, size, and ply of tire, or the type and size of tube; (ii) in the case of a used tire, whether it is sound, repairable, repaired limited service, unrepaired limited service, or not usable on the wheel of a vehicle; (iii) in the case of a basic tire carcass, whether it is sound, repairable, or not usable on the wheel of a vehicle; (iv) in the case of a tube, whether it is sound, repairable, or not usable in a tire; and (v) the price.

* * * * *

SEC. 17. *Maximum prices for used tires and tubes and basic tire carcasses.* (a) For the purpose of this section, tires are of two kinds: (1) Used tires and (2) Basic tire carcasses.

(1) *Used tires.* A used tire is a tire that has been used 1,000 miles or more, or, if it is a recapped tire, has been used 1,000 miles or more after the latest recapping.

* * * * *

**TABLE B-1.—USED PASSENGER CAR TIRES OTHER THAN BASIC
TIRE CARCASSES THAT ARE SOUND OR THAT CAN BE MADE
SOUND**

Tire size	Maximum prices for sound used tires	Deductions required on unrepaired tires	
		Each spot repair needed	Each sec- tional or reinforce- ment re- pair needed
• •	•	•	•
6.00-16.....	6.65	1.50	3.50
• •	•	•	•